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Kathryn R. L. Rand

MAKING A REAL DIFFERENCE: THE DOMINANCE APPROACH IN THE OPINIONS OF JUSTICE BERYL J. LEVINE

KATHRYN R. L. RAND*

"[W]e who work with law need to be about the business of articulating the theory of women's practice—women's resistance, visions, consciousness, injuries, notions of community, experience of inequality."[1]

I. INTRODUCTION

Catharine MacKinnon has been called "the most prominent and persistent advocate" for a strand of feminist theory which describes sex inequality in terms of women's social subordination.[2] This strand, termed the "dominance approach," recognizes and challenges a pervasive system of gender hierarchy. It is a more sophisticated way of thinking about sex inequality, in that it critically examines, rather than seeks to obtain, the status quo.

Justice Beryl Levine, the first woman to sit on the North Dakota Supreme Court, has adopted in part the dominance approach, as evidenced particularly by her opinions involving child custody and spousal support. In this way, Justice Levine sits apart from her colleagues, not because of her gender, but because of her awareness that women's inequality is not theoretical or abstract, but rather real and concrete. Justice Levine's acknowledgment of women's reality outside the courtroom benefits not only the woman named in a particular case caption, but all women. Her willingness to state women's reality in the face of the law's dogged attachment to ostensible gender-neutral principles serves both to educate North Dakota policy makers and to build a more sophisticated jurisprudence of sex equality.

This essay sets out the dominance approach as described in MacKinnon's work, and then identifies the dominance approach in Justice Levine's opinions. Justice Levine may or may not have been influenced by MacKinnon's work; my purpose is not to contend that she has so been. Instead, my implicit argument is to advocate a theory of

* Law Clerk to Chief Judge J.P. Stadtmueller, United States District Court, Eastern District of Wisconsin. B.A., University of North Dakota, 1990; J.D., University of Michigan Law School, 1993. The author served as law clerk to Justice Beryl J. Levine from 1993-1994.

1. Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13, 14 (1991) [hereinafter MacKinnon, *Practice to Theory*].

2. Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 829 (1988) (reviewing CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987)).

sex equality which takes into account women's socially constructed inequality. This, I suggest, is exactly what Justice Levine has done.

II. THE DOMINANCE APPROACH

The dominance approach to sex equality is best understood as contrasted to the difference approach. The difference approach, simplified, argues that women should be permitted to compete with men on equal terms in the public world. It attacks gender-based distinctions as arising out of inaccurate female stereotypes and thus perpetuating women's social subordination.[3] Legal doctrine has embraced the difference approach as the touchstone of sex equality theory,[4] exemplified by the Constitution's *similarly situated* requirement and summarized in Aristotle's axiom that equality is treating likes alike and unlikes unalike.[5]

The difference approach endorses gender neutrality, insisting that women are, and thus should be treated, the same as men.[6] It was a legal attempt to advance women, but fell short of addressing the roots of sex inequality: "The point was to apply existing law to women as if women were citizens—as if the doctrine was not gendered to women's disadvantage, as if the legal system had no sex, as if women were gender-neutral persons temporarily trapped by law in female bodies."[7] Thus, the difference approach, because it is based on formal equality and sex-blindness, fails to recognize the existing structural inequalities of the sexes. "Equality, in this approach, merely had to be applied to women to be attained. Inequality consisted in not applying it. The content of the concept of equality itself was never questioned."[8] Overlooked by

3. *See, e.g.*, Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978).

4. *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 206-07 (1977) ("[G]ender-based differentiation . . . is forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations or 'old notions,' such as 'assumptions as to dependency,' that are more consistent with 'the role-typing society has long imposed,' than with contemporary reality.") (citations omitted); Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973) ("[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.").

5. ARISTOTLE, NICHOMACHEAN ETHICS bk. V, ch. 3, 1131a, 1131b (Irwin trans. 1985).

6. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 33-34 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED] ("[T]he difference approach . . . is obsessed with the sex difference. The main theme in the fugue is 'we're the same, we're the same, we're the same.' The counterpoint theme (in a higher register) is 'but we're different, but we're different, but we're different.'"). Incidentally, the title, FEMINISM UNMODIFIED, comes from MacKinnon's distinction between liberal feminism and socialist feminism on one hand, and radical feminism on the other: "[J]ust as socialist feminism has often amounted to marxism applied to women, liberal feminism has often amounted to liberalism applied to women. Radical feminism is feminism." That is, feminism without a modifier. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC'Y 635, 639 (1983) [hereinafter MacKinnon, *Feminist Jurisprudence*].

7. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286 (1991) [hereinafter MacKinnon, *Reflections*].

8. *Id.*

the difference approach is how difference is created and defined by white male norms, standards, and institutions: "Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other to have it?"[9]

MacKinnon's work builds from these criticisms of the difference approach and the idea that gender is a socially constructed hierarchy (in which women are subordinate to men) rather than mere difference. "Gender, elaborated and sustained by behavioral patterns of application and administration, is maintained as a division of power."[10] Predating and precipitating forms of government, the gender hierarchy is both perpetuated and codified by government. "[T]he state, in part through law, institutionalizes male power. If male power is systemic, it *is* the regime."[11] This understanding of gender inequality emphasizes that women are subordinate to men because of their status as women, that existing inequality is not an accident wherein a particular individual missed anointment by the Aristotlean ideal.[12]

> Given that women are *not* situated similarly to men, but rather are socially unequal, looking at women one at a time rather than as women ensures that it is only the exceptional woman who escapes gender inequality enough to be able to claim she is injured by it. It seems that we already have to be equal before we can complain of inequality.[13]

MacKinnon argues that by emphasizing difference (and ignoring the fact that men are as different from women as women are from men), the difference approach operates to maintain the gender hierarchy.

> [C]onstruing gender as a difference, termed simply the gender difference, obscures and legitimizes the way gender is imposed

9. *Id.* at 1287.

10. MacKinnon, *Feminist Jurisprudence*, *supra* note 6, at 644.

11. *Id.* at 645.

12. MacKinnon criticizes the world view to which the difference approach subscribes and perpetuates:

> There is a belief that this is a society in which women and men are basically equals[,]. . . [that] [t]his is a world in which it is worth trying. In this world of presumptive equality, people make money based on their training or abilities or diligence or qualifications. They are employed and advanced on the basis of merit. In this world of just deserts, if someone is abused, it is thought to violate the basic rules of the community. If it doesn't, that person is seen to have done something she could have chosen to do differently, by exercise of will or better judgment. Maybe such people have placed themselves in a situation of vulnerability to physical abuse. Maybe they have done something provocative. Or maybe they were just unusually unlucky. . . . The law . . . operates largely within the realm of these beliefs.

Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 10-11 (1985) [hereinafter MacKinnon, *Pornography*]. Feminism, as defined by MacKinnon, "is the discovery that women do not live in this world." *Id.*

13. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 74.

> by force. It hides that force behind a static description of gender as a biological or social or mythic or semantic partition, engraved or inscribed or inculcated by god, nature, society (agents unspecified), the unconscious, or the cosmos. The idea of gender difference helps keep the reality of male dominance in place.[14]

Thus, under the difference approach, the likelihood of obtaining equality is lessened because its very doctrine ignores the existing social inequality of women:

> If gender were merely a question of difference, sex inequality would be a problem of mere sexism, of mistaken differentiation, of inaccurate categorization of individuals. This is what the difference approach thinks it is and is therefore sensitive to. But if gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex inequality questions are questions of systematic dominance, of male supremacy, which is not at all abstract and is anything but a mistake.[15]

Neutral principles, then, so fundamental to the difference approach and so attractive to legal doctrine, are the ultimate failure of the difference approach. "If the law then looks neutrally on the reality of gender so produced, the harm that has been done *will not be perceptible as harm*. It becomes just the way things are."[16] In the same way, by not

14. *Id.* at 3.

15. *Id.* at 42. In the legal system, the failure of the difference approach catches women in a double bind: "[S]ociety advantages [men] before they get into court, and law is prohibited from taking that preference into account because that would mean taking gender into account." *Id.* at 35. Manifestations of the difference approach ask the wrong questions and thus address the wrong problems. For example,

> Attempts to reform and enforce rape laws . . . have tended to build on the model of the deviant perpetrator and the violent act, as if the fact that rape is a crime means that the society is against it, so law enforcement would reduce or delegitimize it. Initiatives are accordingly directed toward making the police more sensitive, prosecutors more responsive, judges more receptive, and the law, in words, less sexist. This may be progressive in the liberal or the left senses, but how is it empowering in the feminist sense? Even if it were effective in jailing men who do little different from what nondeviant men do regularly, how would such an approach alter women's rapability? Unconfronted are *why* women are raped and the role of the state in that.

MacKinnon, *Feminist Jurisprudence*, *supra* note 6, at 643.

16. MacKinnon, *Pornography*, *supra* note 12, at 7-8. By way of illustration, MacKinnon classifies the Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896), as "neutral toward racism," while the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*) and 349 U.S. 294 (1955) (*Brown II*), "recognized its substantivity, therefore its inequality." *Id.* at 6. In the same way, current sex equality doctrine, because it is based on neutral principles, works to preserve the status quo because it recognizes no inequality, and therefore no harm, in the status quo. The dominance approach, on the other hand, recognizes the inequality inherent in the gender hierarchy. Like *Brown*'s groundbreaking recognition that separate is not equal, the dominance approach recognizes that with regard to gender, similarly situated is a farce.

questioning the accepted standard, the difference approach endorses man as the stick (so to speak) against which woman is measured:[17] "As male is the implicit reference for human, maleness will be the measure of equality in sex discrimination law."[18]

In contrast to the difference approach, MacKinnon sees her brand of feminism as "a theory of how the erotization of dominance and submission creates gender, creates woman and man in the social form in which we know them."[19] Thus, the dominance approach identifies the problem as not that the sexes have been treated differently, but that one group (men) has dominated the other (women). This, the recognition that men and women occupy unequal positions of power in society, is the fundamental underpinning of the dominance approach.[20]

> If sex inequalities are approached as matters of imposed status, which are in need of change if a legal mandate of equality means anything at all, the question whether women should be treated unequally means simply whether women should be treated as less. When it is exposed as a naked power question, there is no separable question of what ought to be. The only real question is what is and is not a gender question. Once no amount of difference justifies treating women as subhuman, eliminating that is what equality law is for.[21]

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17. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 43 ("Simply by treating the status quo as 'the standard,' [the difference approach] invisibly and uncritically accepts the arrangements under male supremacy.").

18. MacKinnon, *Feminist Jurisprudence*, *supra* note 6, at 644.

19. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 50. Implicit in this definition is another fundamental tenet of the dominance approach, that is, the role of sexuality as power in creating and perpetuating the gender hierarchy: "Women and men are divided by gender, made into the sexes as we know them, by the social requirements of heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the linchpin of gender inequality." Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC'Y 515, 533 (1982) [hereinafter MacKinnon, *Agenda*] (footnote omitted). MacKinnon provides a provocative shorthand for the role of sexuality in the gender hierarchy: "some fuck and others get fucked." *Id.* at 517.

20. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 50. MacKinnon explains,

> If inequality is concrete, no man is ever in the same position a woman is, because he is not in it as a woman. That does not mean a man cannot be recognized as discriminated against on the basis of sex. It does mean that it is no measure of virtue for an equality theory to accord the same solicitude to dominant groups as to subordinate ones, all the while ignoring who is who. If the point of equality law is to end group-based dominance and subordination, rather than to recognize sameness or accommodate difference, a greater priority is placed on rectifying the legal inequality of groups that are historically unequal in society, and less solicitude is accorded pure legal artifacts or reversals of social fortune.

MacKinnon, *Reflections*, *supra* note 7, at 1324-25.

21. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 43.

Unlike the difference approach, the dominance approach is critical of "reality":[22] "The difference approach tries to map reality; the dominance approach tries to challenge and change it."[23]

That reality is male dominance.[24] Male dominance first sets the standards by which one succeeds (or just survives) in society:

> Men's physiology defines most sports, their needs define auto and health insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their objectification of life defines art, their military service defines citizenship, their presence defines family, their inability to get along with each other—their wars and rulerships—defines history, their image defines god, and their genitals define sex.[25]

So where do women fit in this male-defined society? By definition, in a position subordinate to men. That subordination leads to apparently guilt-free abuses: "[W]omen's situation combines unequal pay with allocation to disrespected work, sexual targeting for rape, domestic battering, sexual abuse as children, and systematic sexual harassment; depersonalization, demeaned physical characteristics, use in denigrating entertainment, deprivation of reproductive control, and forced prostitution."[26] What the difference approach elides is who's on top, in more ways than one.

> To see that these practices are done by men to women is to see these abuses as forming a system, a hierarchy of inequality. This situation has occurred in many places, in one form or another, for a very long time, often in a context characterized

22. *Id.* at 40. I use MacKinnon's term "reality" as a shorthand for the obviously varied circumstances—the realities—women experience. I do not mean to imply that all women's situations are identical. For an argument that feminist theory fails to take account of race and class, see, for example, ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 114 (1988). MacKinnon has specifically addressed Spelman's criticisms. *See* MacKinnon, *Practice to Theory*, *supra* note 1, at 15.

23. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 44. The difference approach fails to recognize that "male power produces the world before it distorts it." MacKinnon, *Agenda*, *supra* note 19, at 542.

24. As MacKinnon explains,

> [M]ale dominance is perhaps the most pervasive and tenacious system of power in history [and] . . . is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.

MacKinnon, *Feminist Jurisprudence*, *supra* note 6, at 638-39. Implicit in MacKinnon's description of male dominance are the standards of whiteness and heterosexuality as additional contributing factors.

25. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 36.

26. MacKinnon, *Practice to Theory*, *supra* note 1, at 15.

> by disenfranchisement, preclusion from property ownership (women are more likely to be property than to own any), ownership and use as object, exclusion from public life, sex- based poverty, degraded sexuality, and a devaluation of women's human worth and contributions throughout society.[27]

The combination of male norms and female subordination creates a self-perpetuating and self-affirming loop: When women do not meet male standards, their "difference" becomes a justification for their exclusion or inferior position.[28] Their inferior position serves as a justification for their abuse at the hands of men. The reality created by the abuse of women makes their "difference" all the more real.

> This subordination of women to men is socially institutionalized, cumulatively and systematically shaping access to human dignity, respect, resources, physical security, credibility, membership in community, speech, and power. Comprised of all its variations, the group women can be seen to have a collective social history of disempowerment, exploitation and subordination extending to the present. To be treated "as a woman" in this sense is to be disadvantaged in these ways incident to being socially assigned to the female sex. To speak of social treatment "as a woman" is thus not to invoke any abstract essence or homogenous generic or ideal type, not to posit anything, far less a universal anything, but to refer to this diverse and pervasive concrete material reality of social meanings and practices such that, in the words of Richard Rorty, "a woman is not yet the name of a way of being human . . . ."[29]

The response of the difference approach to the dominance approach's revelation that harms happen to women because they are women, is that they happen to men, too. "If women are raped, men are raped. If women are sexually harassed, men are sexually harassed. If women are battered, men are battered. Symmetry must be reasserted. Neutrality must be reclaimed. Equality must be reestablished."[30] By forcing the reality of women's subordination into neutral terms, the difference approach makes the inequality invisible, makes the harms to

27. *Id.*

28. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 34. Thus, "neutral" principles—really the standards of a man-made hierarchy—are stacked against women and operate to keep them in their place. "Gender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both." *Id.*

29. MacKinnon, *Practice to Theory*, *supra* note 1, at 15-16 (quoting Richard Rorty, *Feminism and Pragmatism*, 20 MICH. Q. REV. 231, 234 (1991)).

30. MacKinnon, *Pornography*, *supra* note 12, at 14-15.

women individual rather than systematic, makes it our fault.[31] Individualizing the harm of inequality, though disbelieving of women's experience as well as distrusting of their intelligence, capability, and credibility,[32] fails to disprove the validity of the dominance approach.

> [T]o show that an observation or experience is not the same for all women proves only that it is not biological, not that it is not gendered. Similarly, to say that not only women experience something—for example, to suggest that because some men are raped rape is not an act of male dominance—only suggests that the status of women is not biological. Men can be feminized too, and they know they are when they are raped.[33]

As MacKinnon continually reminds her audience, neither inequality nor its harms are apportioned neutrally:

> Men are not paid half of what women are paid for doing the same work on the basis of their equal difference. Everything they touch does not turn valueless because they touched it. When they are hit, a person has been assaulted. When they are sexually violated, it is not simply tolerated or found entertaining or defended as the necessary structure of the family, the price of civilization, or a constitutional right.[34]

Difference, then, and the justified (and unjustified) classifications which follow it, are part of male dominance, particularly as it is expressed in the law. When gender is seen as a result of dominance rather than a manifestation of difference, "gender changes from a

31. This is exemplified through the law of sexual harassment (ironically, because MacKinnon spearheaded the idea that sexual harassment is a form of sex discrimination in her watershed work SEXUAL HARASSMENT OF WORKING WOMEN (1979)), which indicates that if the complained-of conduct is welcome, it cannot constitute harassment. *See, e.g.*, Reed v. Shepard, 939 F.2d 484, 486-87 (7th Cir. 1991). This facet of sex discrimination law leaves open the possibility that some women (or, more accurately, some people) enjoy being harassed. Thus, those women who complain about it may be overly sensitive to what otherwise is red-blooded American male fun. *See, e.g., id.* at 486-87, 492-93 (upholding trial court's finding that plaintiff "was a willing and welcome participant" in such conduct as being "handcuffed to the drunk tank," "physically hit and punched in the kidneys," having her head "forcefully placed in members[']laps," having "a cattle prod with an electrical shock placed between her legs," being "handcuffed to the toilet and [having] her face pushed into the water," and being "maced"). More recently, the Seventh Circuit has rejected the notion that "unladylike" behavior excuses (or perhaps more to the core of the welcomeness doctrine, deserves) what otherwise, had the plaintiff behaved more delicately, would be considered unlawful sexual harassment. *See* Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1010-11 (7th Cir. 1994). In a small step toward recognizing women's position in the gender hierarchy, the court in *Carr* hinted that the workplace reality that men's and women's similar behavior does not carry identical implications might serve as a guiding principle: "The asymmetry of the positions must be considered. She was one woman; they were many men. Her use of terms like 'fuck head' could not be deeply threatening, or her placing a hand on the thigh of one of her macho coworkers intimidating . . . ." *Id.* at 1011.

32. *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 58 ("It is our *reality*, even before our knowledge, that is in doubt.").

33. *Id.* at 56.

34. *Id.* at 41.

distinction that is presumptively valid to a detriment that is presumptively suspect."[35] The dominance approach refuses to abide by the reality of women's social inequality,[36] seeking instead to challenge and change it.

So what of the dominance approach and the law? As with any nascent legal doctrine, it is not cleanly substituted for its predecessor. "Practical considerations . . . suggest that substantial work will be necessary to apply the dominance approach in particular contexts. Whatever the precise meaning of the approach, however, it is clear that its application would move the law further in the direction of gender equality."[37] Justice Levine, as the next section illustrates, has worked to move North Dakota's law closer to gender equality through her application of the dominance approach, particularly in the areas of child custody and spousal support.

III. THE DOMINANCE APPROACH AS PRESENT IN JUSTICE LEVINE'S OPINIONS

The intersection of divorce law and gender inequality is crucial,[38] and represents a particular failure of the difference approach. The few rules of law which benefited women, such as the tender-years doctrine[39] and the traditional concept of alimony,[40] broke down under a gender-neutral approach.

> Under the rule of gender neutrality, the law of custody and divorce has been transformed, giving men an equal chance at custody of children and at alimony. Men often look like better "parents" under gender-neutral rules like level of income and

35. *Id.* at 44.

36. *See id.* at 39 ("For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness.").

37. Sunstein, *supra* note 2, at 838.

38. Women have been both relegated to and abused in the home, largely as a consequence of marriage and motherhood. *See, e.g.*, Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). For a discussion of the "dominant family ecology," see Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2236-48 (1994) (describing "the gendered structure of wage labor, a gendered sense of the extent to which child care can be delegated, and gender pressures on men to structure their identities around work").

39. The tender-years doctrine is an "evidentiary presumption[] in favor of mothers in custody disputes involving young children, children of 'tender years.'" David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 515 (1984).

40. That is, wives, rather than gender-neutral disadvantaged spouses, were awarded alimony under traditional concepts of marriage. *See generally* Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989). MacKinnon notes, however, that the contract concept of marriage is unequally enforced:

> To those of you who think that marriage is an equal bargain, I would suggest, just to begin with, that in any place where one cannot prosecute for marital rape, the woman's obligation to sexually deliver is effectively enforced by the state. The support obligation that men supposedly provide overwhelmingly is not.

MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 76.

> presence of nuclear family, because men make more money and (as they say) initiate the building of family units.[41]

Here, as generally, treating a woman as an individual free of any social barriers, rather than recognizing women's social subordination as a group, compounds rather than addresses gender inequality.

> The group realities that make women more in need of alimony are not permitted to matter, because only individual factors, gender-neutrally considered, may matter. So the fact that women will live their lives, as individuals, as members of the group women, with women's chances in a sex-discriminatory society, may not count, or else it is sex discrimination.[42]

Divorce law, perhaps in particular, is positioned to address several of the circumstances which make up women's reality:

> To be poor, financially dependent, and a primary parent constitutes part of what being a woman means. Most of those who are in those circumstances are women. A gender-neutral approach to those circumstances obscures . . . the fact that women's poverty, financial dependency, motherhood, and sexual accessibility . . . substantively make up women's status *as women*. It describes what it is to be most women. That some men find themselves in a similar situation doesn't mean that they occupy that status *as men*, as members of their gender. They do so as exceptions, both in norms and numbers.[43]

The recognition of this reality, and the willingness to posture gender neutrality as political rather than moral,[44] are the foundation of the dominance approach.

Justice Levine's opinions in the areas of child custody and spousal support, though generally carefully couched in gender-neutral terms, evidence a pointed accounting of the reality of women's situations.[45]

41. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 35 (footnotes omitted).

42. *Id.*

43. *Id.* at 73. For a discussion of the intersection of gender and race with regard to alimony, see Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481 (1994).

44. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 44 ("In the dominance approach, sex discrimination stops being a question of morality and starts being a question of politics.").

45. These are not, however, the only areas in which Justice Levine has refused to turn a blind eye to the world outside of the courtroom. In a sexual harassment case, Justice Levine offered the opinion that sex discrimination "goes beyond all bounds of decency and is truly atrocious and utterly intolerable in a civilized community." Swenson v. Northern Crop Ins., Inc., 498 N.W.2d 174, 188 (N.D. 1993) (Levine, J., concurring). She has noted the historical roots of women's subordination, and the resultant denial of power, on several occasions. *E.g., id.* at 189 ("The exclusion of women [from the practice of law] rested on the belief that men, simply because they were men, belonged in the public sphere rife with power and status, and women, in the private sphere—the home."); City of Mandan v. Fern, 501 N.W.2d 739, 746 (N.D. 1993) ("Gender-based peremptory challenges are a bad

She has championed, without success,[46] the "primary caretaker" rule, which states (as announced by the Minnesota Supreme Court) "that when both parents seek custody of a child too young to express a preference, and one parent has been the primary caretaker of the child, custody should be awarded to the primary caretaker absent a showing that that parent is unfit to be the custodian."[47] The primary-caretaker rule counteracts, to an extent, the disadvantage to women built into gender-neutral custody factors by giving custody to the parent who actually cared for the child, in most instances the mother. This allows women, who, along with their children, suffer devastating economic consequences after divorce,[48] to trump men's economic advantage.[49] Justice Levine also has driven home the point that women earn less income than men, period. She has attempted to introduce this reality into determinations of spousal support and property division.[50]

A. CHILD CUSTODY

In *Gravning v. Gravning*,[51] the majority upheld the trial court's award of custody of the couple's son to the father, and the couple's daughter to the mother.[52] In so doing, the court expressly rejected the primary-caretaker rule:

> Some courts have made the "primary caretaker" factor into a presumptive rule, . . . but in North Dakota the concept inheres in the statutory factors and has not yet been accorded elevated status. . . . In North Dakota, parents "have equal rights" as to the "care, custody, education, and control of their minor children. . . . Between the mother and father . . . there is no

remnant of the historic denial of women's rights."). Justice Levine's concurring opinion in *Swenson*, incidentally, contains the one explicit reference to the dominance approach of which I am aware in her opinions: a citation to a law journal article standing for the proposition that the "legal concept of reasonable 'man' standard or gender-neutral standard does not work in sexual harassment cases because it fails to recognize 'male dominance' within 'the larger phenomenon of gender hierarchy.'" *Swenson*, 498 N.W.2d at 188 (quoting Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 53 (1990)).

46. *See, e.g.*, Schneider v. Livingston, 543 N.W.2d 228, 230 (N.D. 1996) ("[T]he primary caretaker rule has never gained a presumptive status in North Dakota . . . .").

47. Pikula v. Pikula, 374 N.W.2d 705, 712 (Minn. 1985). *See generally* Chambers, *supra* note 39, at 527-41 (discussing the relevance of a parent's status as primary caretaker in custody decisions). The court's decision in *Pikula* was penned by Justice Rosalie E. Wahl, the first woman on the Minnesota Supreme Court.

48. *E.g.*, LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 337-56 (1985).

49. *See* Chambers, *supra* note 39, at 538-41; Marcia O'Kelly, *Blessing the Tie That Binds: Preference for the Primary Caretaker as Custodian*, 63 N.D. L. REV. 482, 540-41 (1987).

50. *But see* Marcia O'Kelly, *Entitlements to Spousal Support After Divorce*, 61 N.D. L. REV. 225, 242 (1985) ("Rehabilitative support is ordinarily awarded for a limited amount of time because of a reasonable expectation that further training, experience, and circumstances will enable the recipient to obtain appropriate employment during that period.").

51. 389 N.W.2d 621 (N.D. 1986).

52. Gravning v. Gravning, 389 N.W.2d 621, 624 (N.D. 1986).

> presumption as to who will better promote the best interests and welfare of the child."[53]

Justice Levine dissented on the basis that the mother had been the primary caretaker of the children and thus should have received custody of both children.[54] While giving principal attention to the impact of primary-caretaker custody on a child's best interests,[55] Justice Levine implicitly recognized women's relatively weak bargaining position in divorce negotiations:

> [T]he primary caretaker rule will benefit the negotiation process between divorcing parents. By virtue of the caretaking function, the primary caretaker is likely to be closest to the child, and thus generally will be substantially more distressed by the loss of custody than the other parent. Consequently, because primary caretakers have the most at stake in custody disputes, they are likely to make the most concessions regarding alimony, support and property matters, especially when the other parent uses the issue of custody as a coercive bargaining weapon. The primary caretaker rule will strengthen and protect the primary caretaker's out-of-court bargaining position.[56]

Though careful to stay within the bounds of existing law by stressing the fact that "on its face, at least, the primary caretaker rule is gender neutral,"[57] Justice Levine nevertheless was mindful of the effect of the rule on women.[58] Justice Levine reiterated her inclination to adopt the

53. *Id.* at 622 (quoting N.D. CENT. CODE §§ 14-09-06, 14-09-06.1) (citations omitted) (fourth alteration in original).

54. *Id.* at 625.

55. *Id.* In *Kaloupek v. Burfening*, 440 N.W.2d 496 (N.D. 1989), Justice Levine quoted Professor Marcia O'Kelly's psychological-bond rationale for the primary-caretaker rule:

> Professor O'Kelly describes more persuasively and effectively than I can the rationale for the presumption favoring the primary caretaker of young children and the impact of the intimate interaction between young children and their primary caretaker:
>
> "[Primary] caregiving creates strong psychological bonding and that protection of the psychological bond . . . is more important than other relevant considerations in identifying the parents in whose custody children 'will . . . feel more loved or secure, or, in the long term, be more competent and effective as adults.'"

Id. at 500 (Levine, J., dissenting) (quoting O'Kelly, *supra* note 49, at 509 (quoting Chambers, *supra* note 39, at 503)) (alterations in original).

56. *Gravning*, 389 N.W.2d at 625 (Levine, J., dissenting) (citations omitted).

57. *Id.*; *see also* O'Kelly, *supra* note 49, at 540.

58. *Gravning*, 389 N.W.2d at 625 (Levine, J., dissenting). Professor O'Kelly agrees:

> Even though it is not intended as a disguised maternal preference, the impact of a primary parent preference will certainly favor mothers. Given the gender-based role division that continues to dominate American society, the primary caregiving parent is more often female than male, whether or not she is employed outside her home.

O'Kelly, *supra* note 49, at 540. Nevertheless, Professor O'Kelly quickly disowned any suggestion of female favoritism:

> However, the justifications for a primary caretaker presumption are genuinely gender-neutral. The desire for a clear rule to facilitate private bargaining masks no

primary-caretaker rule in *Kaloupek v. Burfening*[59] and *Branson v. Branson*.[60]

Justice Levine wrote separately in *Severson v. Hansen*[61] "to expose the issue of gender bias and to suggest that much needs to be done to educate and familiarize all judges and lawyers (and psychologists too, as this case suggests) on the subject, so that when gender bias is present it can be recognized and diffused."[62] Justice Levine examined the psychological evaluations of the parents in a custody dispute. The father, though exhibiting "considerable degrees of anger and resentment" and "self-medicat[ing] . . . with cigarettes and alcohol," was simply "reacting normally to the stress" caused by the divorce and custody dispute.[63] The mother, on the other hand, exhibited "hysterical reactions" by crying, raising her voice, and sharpening her tone,[64] and accordingly was pronounced "paranoid" and "delusional."[65] Justice Levine took the examining psychologist to task, pointing out that under a male standard, "'typically male' emotions and responses are normal, while 'typically' female emotions and responses are not."[66] Although a more subtle application of the dominance approach, Justice Levine's refusal to gloss over the blatant sexism of the psychologist's report illustrates,[67] to paraphrase MacKinnon, that the male psyche defines psychology.[68]

B. SPOUSAL SUPPORT

Justice Levine appears to have been the Court's sole advocate of taking into account the lesser earning capacities of women, as a subordinate group, with regard to spousal support and property division. In *Volk v. Volk*,[69] Justice Levine took issue with the trial court's failure to accord a wife's work in the home the same status as her husband's job.[70]

> The trial court's finding that "nearly all of the property acquired during the marriage came as a result of Pius' work

substantive bias of any kind. The need to avoid coercive misuse of the custody issue against the primary caretaker is meant to protect the spouse who needs that protection because of function rather than gender.

Id. MacKinnon, one presumes, would argue that gender is the defining indicator of vulnerability to coercive tactics in divorce negotiations.

59. 440 N.W.2d 496, 500 (N.D. 1989) (Levine, J., dissenting).

60. 411 N.W.2d 395, 401 (N.D. 1987) (Levine, J., concurring and dissenting).

61. 529 N.W.2d 167 (N.D. 1995).

62. Severson v. Hansen, 529 N.W.2d 167, 170 (N.D. 1995) (Levine, J., concurring).

63. *Id.*

64. *Id.*

65. *See id.* at 171 (noting second psychologist's criticism of original pschological evaluation).

66. *Id.*

67. *Id.*

68. *See* MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 23 (noting that females are institutionalized "for behavior that is not punished, is even encouraged, in [males]").

69. 376 N.W.2d 16, 19 (N.D. 1985) (Levine, J., concurring and dissenting).

70. Volk v. Volk, 376 N.W.2d 16, 19 (N.D. 1985) (Levine, J., concurring and dissenting).

> effort" is likewise clearly erroneous. It is clear that in the enterprise of marriage a traditional homemaker's contributions arising from child care and home care constitute a valuable contribution. . . . Here, Aleta not only cared for home and children, she also held a fulltime job outside the home for twenty-six years out of this twenty-eight year marriage. . . . If a non-wage-earning homemaker's contribution is substantial, it follows *a fortiori*, that a wage-earning homemaker's contributions are substantial. Yet the trial court noted only that Pius held down more than one job throughout most of the marriage. It overlooks entirely that the same was true for Aleta. The only difference between their respective extra jobs was Pius' remuneration for his.[71]

Justice Levine took the opportunity presented by *Beals v. Beals*[72] to give trial courts a lesson in divorced women's reality:

> In order to fairly consider the matter of spousal maintenance, a trial court must understand, as a general proposition, the economic realities of the marketplace as they affect those women who have foregone training in favor of homemaking or have absented themselves from the workplace and foregone career advancement in favor of homemaking, or have worked at low-paying jobs to supplement the primary breadwinner's income.
>
> Generally, the economic consequences of divorce for women are devastating. A wife's post-divorce income is about half that of her former husband. Because, as a rule, women have lower earning capacities, their net worth declines by 25% within four years of divorce, while their former husbands' improve. Within eight years after divorce a woman will often have a negative net worth.[73]

Justice Levine went on to opine that these factors demonstrate the potential necessity for permanent support. Importantly, Justice Levine took into account the fact that women's work (meaning work—*any* work—done by women) is valued less than that of men "*as a rule*."[74]

Wiege v. Wiege[75] presented a specific example of when temporary rehabilitative support awarded to a woman may not serve its intended purpose because of discriminatory, but nevertheless real, limitations on

71. *Id.* (citations omitted).
72. 517 N.W.2d 413 (N.D. 1994).
73. Beals v. Beals, 517 N.W.2d 413, 418 (N.D. 1994) (Levine, J., concurring) (citations omitted).
74. *Id.* (emphasis added).
75. 518 N.W.2d 708 (N.D. 1994).

women's earning capacities.[76] At the time of their divorce, the husband earned $18.90 an hour working for a telephone cooperative, while the wife earned $4.90 an hour at a retail store.[77] Both had high school degrees.[78] Justice Levine noted that

> Larry's earning capacity of four times more than Dianne's is typical of the general disparity in earning capacities between divorcing men and women. Temporary rehabilitative support that enables a spouse like Dianne to obtain education or training is unlikely to achieve the parity necessary for Dianne to maintain her prior standard of living or to bear no greater reduction than Larry in her post-divorce standard of living. A remedy for this permanent disparity in earning capacity and the inequitable burdens the disparity breeds is permanent support.[79]

Most recently, in *Quamme v. Bellino*,[80] Justice Levine's brethren, in their windowless courtroom, chose not to look at the social realities affecting women. The case provides an impeccable example of neutral principles in action. Bellino, the wife, argued that the North Dakota Supreme Court had "hinted that special considerations must be given to awarding spousal support where the spouse that has been disadvantaged by the marriage is a woman."[81] Characterizing Bellino's argument as a "call for gender biased treatment," the Court rejected it out of hand:

> Bellino offered no evidence she would be disadvantaged by her gender in her chosen profession . . . . Legal principles based on stereotyped assumptions are unworthy of our judicial system, and participants in our justice system are entitled to be free from such categorizing. Stereotyping leads to bias and prejudice; it doesn't correct it.[82]

Justice Levine, while concurring, refused to confuse stereotype with reality, stating, "[i]t is not a 'stereotyped assumption' that women are more likely to be economically disadvantaged by divorce than men: It is a plain fact, which has been established in study after study."[83] Quoting Lenore Weitzman's "famous figure"[84] that "divorced men experience an average 43 percent rise in their standard of living in the

76. Wiege v. Wiege, 518 N.W.2d 708, 711-12 (N.D. 1994).
77. *Id.* at 710.
78. *Id.*
79. *Id.* at 713 (Levine, J., concurring) (citation omitted).
80. 540 N.W.2d 142 (N.D. 1995).
81. Quamme v. Bellino, 540 N.W.2d 142, 147 (N.D. 1995).
82. *Id.*
83. *Id.* at 148 (Levine, J., concurring) (citations omitted).
84. Williams, *supra* note 38, at 2228 n.1.

first year after the divorce, while divorced women (and their children) experience a 73 percent decline,"[85] Justice Levine concluded,

> [I]t is not biased to recognize that women are more likely to fall into the category of "disadvantaged spouse" and that homemakers are more likely to encounter an inhospitable job market. The reality of gender-based bias, discrimination and detriment is not pretty, and we cannot make it go away merely by calling it a "stereotyped assumption" and closing our eyes to it under the guise of "blind justice."[86]

As the above excerpts illustrate, Justice Levine's opinions take into account the reality of gender inequality. In this way, her opinions follow the dominance approach to sex inequality. Particularly in the areas of child custody and spousal support, Justice Levine has been a lone voice in relaying women's experience of "poverty, financial dependency, [and] motherhood."[87] Her statements cast doubt on the ostensible gender neutrality of the rules enacted by the North Dakota legislature and enunciated by the Court, revealing their bias against women and their role in maintaining the status quo. Though obviously aware of the limitations placed on her by existing law, Justice Levine nevertheless injected women's reality where she could.

IV. CONCLUSION

When Justice Levine joined the Court, she had, as the first woman, an implicit choice. She could see her position as proof that sex discrimination does not exist,[88] or she could use her position as a vehicle for eradicating sex discrimination and pursuing sex equality. To her credit, her opinions reflect an awareness of women's reality outside the courtroom—no matter to what extent Justice Levine personally experienced that reality. Despite her own successes, which are many, Justice Levine never forgot that many women—most women—fail (to some degree) rather than succeed in the face of gender inequality.

85. *Quamme*, 540 N.W.2d at 148-49 (Levine, J., concurring) (quoting WEITZMAN, *supra* note 48, at 323).

86. *Id.* at 149.

87. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 73.

88. "When a few of us, the exceptions, overcome all this, we are told we prove that there are no barriers there and are used as examples to put other women down. She made it, why can't you?" *Id.* at 76. Supreme Court Justice Clarence Thomas is a convenient subject of this criticism. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in the judgment) (calling affirmative action programs "racial discrimination, plain and simple"); Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117, 123 (1993) ("Leaders of the Black community, in particular, were disturbed by [Thomas's] record on civil rights and by the level of concern he had shown for the poor and disadvantaged.").

> [T]o those who say, "Any woman can," as if there were no such thing as discrimination, as if *that* were exceptional, I say this, and I say it as a woman: *all women can't.* And that will be true so long as those who do make it are the privileged few. Until all women can, none of us succeed as women, but as exceptions. When we fail, we fail with 53 percent of the population; when we succeed, we succeed alone.[89]

This, perhaps, was her greatest challenge as a judge: to remember that women's successes should serve as a model of women's potential in an ideal world of sex equality, rather than proof that sex discrimination does not exist. One hopes that Justice Levine's opinions will remind those who follow her of the same.

During an address given in honor of Minnesota Supreme Court Justices Rosalie Wahl and M. Jeanne Coyne,[90] MacKinnon asked, "[W]ill they use the tools of law as women, for all women?"[91] With regard to Justice Levine and her tenure on the North Dakota Supreme Court, the answer is yes.

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89. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 76-77.

90. Justice Coyne, when asked whether women judges decide cases differently by virtue of being women, answered that "a wise old man and a wise old woman reach the same conclusion." Although female biology is not a prerequisite to comprehending the dominance approach (just ask Jeffrey Masson), the approach itself was borne of women's experience. As Ruth Bader Ginsburg has noted in response to Justice Coyne's remark, "[W]omen, like persons of different racial groups and ethnic origins, contribute what . . . [has been] described as 'a distinctive medley of views influenced by differences in biology, cultural impact, and life experience.'" Ruth Bader Ginsburg, *The Progression of Women in the Law*, 28 VAL. U. L. REV. 1161, 1174 (1994) (quoting Judge Alvin Rubin). Thus, although not determinative, the coincidence of Justice Levine's gender and opinions (in the broad sense of the term) is no accident.

91. MACKINNON, FEMINISM UNMODIFIED, *supra* note 6, at 77.